

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
FILED
CLERKS OFFICE

EARNEST N. BENJAMIN,)
Petitioner,) 2005 FEB 14 P 3:49
)
V.)
) U.S. DISTRICT COURT
) DISTRICT OF MASS
)
LUIS SPENCER,)
Respondent.)

PETITIONER'S OBJECTION TO THE FINDINGS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE, ROBERT B. COLLINGS,
PURSUANT TO F.R.CIV.P., RULE 72(b)

Now comes the petitioner, Earnest N. Benjamin, acting
pro-se in the above-referenced matter and hereby states his
objection to the findings and recommendations of Collings,
U.S.M.J..

As grounds for this objection your movant states:

1. As a matter of law, once the Judge Tauro allowed the
petitioner to dismiss the second petition without prejudice,
said petition cannot be construed as a second or successive
petition and therefore the matter should have been
considered on the merits of the claims.

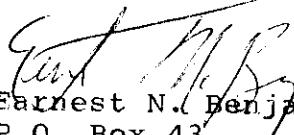
2. As the Magistrate judge pointed out, "if [the]
petitioner elected to proceed with an adjudication of his
exhausted claims in the first petition, and those claims
were, in fact, adjudicated, a second petition would be
subject to dismissal as a 'second or successive'
petition. (citation omitted).""...post-AEDPA cases... have
preserved the rule that if the original petition did not
produce an adjudication, (as was the case herein), on the
merits a prisoner's later petition did not produce an

adjudication on the merits a prisoner's later petition will not be deemed 'second or successive'." Pratt v. United States, 129 F.3d 54, 60 (1st. Cir. 1997). Accordingly, the petitioner's instant case should not have been dismissed because no adjudication of the petitioner's first petition was ever issued by the district court.

Wherefore, the petitioner respectfully requests that the District Court reject the findings and recommendations of the Magistrate Judge and allow the instant case to proceed on its merits.

Dated: February 12, 2005.

Respectfully submitted,


Ernest N. Benjamin,
P.O. Box 43
Norfolk, MA 02056

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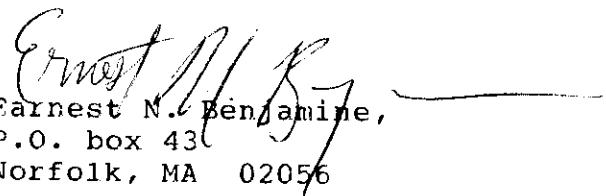
EARNEST N. BENJAMIN,)
Petitioner,)
)
)
V.)
)
)
)
LUIS SPENCER,)
Respondent.)

CERTIFICATE OF SERVICE

I, Earnest N. Benjamin, have cause to be served upon
_____, the Assistant Attorney General one
copy of the petitioners objection to the findings and
recommendations dismissing the petitioner's complaint, via
first class mail.

Dated: February 12, 2005.

Respectfully submitted,


Ernest N. Benjamin,
P.O. box 43
Norfolk, MA 02056